stock market crashed in the later part of 1973. On January 12, 1974 the respondent demanded payment. The appellant was unable to pay and asked for time hoping that the share value would appreciate. Judging from the correspondence that ensued between the appellant and the respondent it is evident that the appellant was playing for time. Presumably the respondent was also hoping that the appellant would settle the balance outstanding for no action was taken either to sell the shares or to commence legal proceedings to recover the sum owed until some months later. Finally the respondent sold the shares for $46,945.20 leaving a balance of $13,174.59 on the overdraft account.

In the court below one of the questions raised by the appellant was that there was an oral agreement between him and the respondent requiring the respondent to sell the shares when their value dropped to $98,000. The learned judge found as a fact that there was no such agreement and there was therefore no breach of contract as alleged by the appellant. This finding of the learned judge is not contested in this appeal. The appellant's case is that, in substance, the learned judge had failed to consider the defence and had erred in law in treating the case as a simple claim for balance of overdraft. It is the appellant's contention that the manager of the respondent bank who purchased the shares was acting as the agent of the bank and the appellant. There was therefore the question of pledge and duty of the bailee that called for determination by the court. It is submitted that the bailee or 'pawnee', namely the respondent was under a duty to ensure that the sale of shares was a provident one. Reliance is placed upon sections 125 to 129 of our Contract Act, 1950. It is further submitted that as this question was not considered by the learned judge, the appeal should therefore allowed and a retrial ordered.

First and foremost the question that must necessarily be considered is whether the question raised by the appellant was an issue disclosed by the pleadings. It is a cardinal principle of law that a judge is bound to decide a case on the issues on the record. (See *Hj. Mohd. Dom* v. *Sakiman*[1]).

The question therefore is whether the appellant specifically and distinctly pleaded in his statement of defence the point which he now desires to raise.

The relevant paragraph of the statement of defence relied upon by the appellant is paragraph 9 which is reproduced hereunder for easy reference —

"9. The plaintiffs are guilty of negligence and breach of their duty to the defence.

PARTICULARS OF PLAINTIFFS' NEGLIGENCE AND BREACH OF DUTY

(i) They failed to sell the said shares when their value dropped to $98,000.

(ii) They failed to sell the said shares when instructed to do so in April, 1974.

(iii) They grossly and unreasonably delayed the selling of the said shares.

(iv) They failed to take any or sufficient care in the handling of the said shares.

(v) They failed to take any or sufficient steps to protect the interest of the defendant."

It was pointed out by Mrs. Oliveiro, counsel for the respondent that the question of pledge was not pleaded and it is raised for the first time in this appeal.

In consideration of the language used in paragraph 9 and to describe the particulars of negligence and breach of duty we form the view that on a fair construction the reference to the respondent's negligence was clearly in relation to the allegations contained in paragraphs 5 to 8 of the statement of defence and that the particulars in (i), (ii), (iii) and (iv), in paragraph 9 are nothing more than repetitions of the earlier allegations.

There is clearly no specific or distinct allegation made in the statement of defence on the question of agency or of pawnor and pawnee. Nowhere too is it alleged that the manager of the respondent bank was engaged in the share purchase transaction either as agent of the respondent bank or of the appellant and in that capacity had breached his duty.

In *Selangor United Rubber Estates Ltd.* v. *Cradock & Ors.*[2] it was held that "where a plaintiff alleged a breach of duty arising from any given relationship, he had to specify with precision the relation under which that duty arose."

This was an action brought by a company against nine defendants including the applicant bank where the plaintiff alleged, *inter alia,* negligence against the bank as banker.

In the instant case we find no issue on record before the learned judge on the question raised in the appeal upon which he had to adjudicate. In our view the learned judge properly decided the case on the issues disclosed by the pleadings. This appeal must necessarily fail and it is accordingly dismissed with costs.

Appeal dismissed.

Solicitors: *Sri Ram & Co.; Lee Boon Peng & Co.*

KOW AH DEK & ANOR. v. K. RATNASINGAM

[F.C. (Suffian L.P., Salleh Abas & Abdul Hamid F.JJ.) January 13 & February 21, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 165 of 1979]

Tort — Negligence — Road accident — Brain injury — Damages — Quantum — Damages for pain and suffering and loss of amenities — Damages for loss of future earnings.

Damages — Brain injury — Minimal — Pain and suffering — Loss of amenities.

In this case the respondent was injured in a road accident and suffered minimal brain damage. He was awarded damages of $70,000 for pain and suffering and loss of amenities of life, $112,722.80 for loss of future earnings before retirement and $60,908 for loss of future earnings after retirement. The appellant appealed against the quantum of damages.

Held: (1) although the award for pain and suffering and loss of amenities of life was on the higher side, it was not shown that the learned judge had wrongly used his discretion in arriving at the figure and therefore the award would be confirmed;

(2) the assessment of loss of future earnings by the learned judge which was based on the difference between the respondent's present salary and what he would get as a Superscale *G* officer, was untenable as it was contrary to the evidence and common experience and therefore the award could not be sustained;

(3) the respondent was entitled to damages for loss of earnings after retirement and this would be assessed at $31,172.23.

Case referred to:-

(1) *Mohamed Ibrahim & Anor.* v. *Christopher Piff & Anor.* [1981] 1 M.L.J. 221.

FEDERAL COURT.

Dato Wong Seng Chow for the appellant.

G.T.S. Sidhu for the respondent.

Cur. Adv. Vult.

Salleh Abas F.J. (delivering the judgment of the Court): The respondent was the headmaster of Tunku Besar School, Tampin. On May 4, 1973 he was injured in a road accident at the 4th milestone Seremban Tampin road. Liability for the accident was conceded by the appellant, and so after hearing evidence on quantum the learned trial judge awarded him a total sum of $254,130.80 made up as follows: —

(a)	For pain suffering and loss of amenities of life	$ 70,000.00
(b)	Loss of future earnings prior to retirement	$112,722.80
(c)	Loss of future earnings after retirement	$ 60,908.00
(d)	Loss of gratuity	$ 10,000.00
(e)	Special damages for transport	$ 500.00
	Total:	$254,130.80

Datuk Wong Seng Chow, counsel for the appellant submitted that the quantum of damages is too high to be a fair and reasonable award. He said that the sum of $70,000 awarded for pain, suffering and loss of amenities of life should be reduced to $60,000 or $65,000 and that there ought to be no award at all for loss of future earnings and gratuity, as the respondent continues to be employed on the same pay as before the accident, though he is no longer the headmaster of the school.

On admission to hospital following the accident, the respondent was in coma lll, responding only to pain. He had a marked contusion of his scalp over the right parietal region and showed evidence of a considerable evidence of brain oedema, i.e. swelling of the brain. He also had a large laceration over his left shoulder with considerable oedema measuring 5" x 2". In addition he had a fracture of his nasal bone with slight distortion and bleeding nostrils. He was discharged from the hospital on June 20, 1973 and subsequently seen regularly on follow-up check-ups by Dr. N. Arumugasamy, M.D. Head of Department of Neurosurgery on a number of occasions. He was pronounced fit to return to work in the middle of November 1973 — i.e. about six months after the accident. According to Dr. N. Arumugasamy the respondent suffers a minimal brain damage resulting in a considerable change in his behaviour. He becomes very talkative and is full of complaints even over small matters. He has lost self-confidence and relies a great deal upon his sister for material support. He has frequent headache on the right side of his head and suffers decreased vision on his right eye. He is unable to apply himself to tasks requiring mental concentration, and has poor memory. He suffers from severe episode of vertigo — i.e. unsteady on his feet. He also has fits and dizziness. Further because of the accident he wears a collar around his neck. Dr. K.L. Yeoh of the Department of Psychological Medicine of the University of Malaya and Dr. Teoh Jin Inn a consultant Psychiatrist in private practice who both examined the respondent confirmed the conclusion of Dr. N. Arumugasamy.

For these injuries the learned judge assessed a sum of $70,000 as damages for pain suffering and loss of amenities. In another case, *Mohamed Ibrahim & Anor.* v. *Government of Malaysia & Ors.*[1] heard by a different panel, this court awarded $70,000 for pain suffering and loss of amenities for more severe brain injuries caused to a girl aged 7 years now aged 11 years plus. This girl has suffered permanent irreversible brain damage with regressive effects, such as mental retardation to a child of 3 to 5 years old, inability to control her bowel and requiring constant care and attention. Admittedly the injuries in that case are more severe than those suffered by the appellant and so the award under this heading in this case for the sake of consistency should be less than $70,000. However, we do not see any reason why we should reduce the award under this heading, though it is on the higher side, unless it can be shown that the learned judge has wrongly used his discretion in arriving at this figure. In any case counsel for appellants submitted that the award under this heading should be between $60,000 and $65,000. The difference of $5,000 between the judge's figure and counsel's figure is minimal and therefore gives us no reason to interfere with the award. And so the figure of $70,000 awarded for pain suffering and loss of amenities of life is confirmed.

As regards loss of future earnings, the learned judge divided the award into two subheadings, (a) $112,722.80 as loss from the date of the accident to the date of respondent's retirement and (b) $60,908 as loss after retirement. The award under subheading (a) is based on the assumption that, but for the injuries received by him, the respondent would in all probability have passed the Bahasa Malaysia examination and so would have the chance of being promoted to Superscale *G* post entitling him to a higher salary.

The respondent was and still is an unconfirmed education officer when he met with the accident on May 4, 1973. He was appointed to the service subject to a three year probationary period with effect from September 5, 1969. This period would have expired on September 4, 1972 unless extended further. As regards his work several witnesses gave evidence in his favour that he was an efficient and capable officer. He, however, had problems with the passing of the prescribed Bahasa Examinations. Until and unless he has passed these examinations he would not be confirmed in the service and so there would not be any opportunity for further promotion in the service. These examinations consist of four papers: Paper I (essay and letter writing), Paper II (grammer), Paper III (history and culture) and Paper IV (oral). The

examinations are held twice a year; in June and December of each year. So for a three year period of probation there are no less than six examinations held. As he was appointed on September 5, 1969, the earliest opportunity for him to sit for the examinations was in December 1969 and the latest was June 1972. It is our view that the fact that he did not sit for the December 1969 examinations should not be held against him, because he was appointed to the service only four months earlier. However, he made no attempts at all to sit for the examinations in the subsequent two years: 1970 and 1971. On January 25, 1972 there was another examination, but the respondent never turned up for the examination. His first and only attempt was on June 6, 1972, i.e. just three months before the expiry of his probationary period, when he sat for two papers — Paper I and Paper II. He passed in Paper I but failed in Paper II. When his probationary period ended on September 4, 1972, the Ministry of Education extended it for another year until September 4, 1973, subject to the stoppage of salary increments and a warning that he had to pass the remaining three papers during the one year extended period. Despite the warning and the stoppage of increments he also did not sit for the December 1972 examinations. No reason was given as to why he neglected to sit for these examinations. His counsel submitted that as the headmaster the respondent was too busy to sit for the examinations. In our view this is a lame excuse, because we know for a fact from our own experience as civil servants that there are thousands of other busy officers like the respondent, who yet sit and pass the examinations. He was injured on May 4, 1973, i.e. one month before the June 1973 examinations. There is no evidence on record to show what preparations he had made in order to sit for these examinations, but judging from his previous attitude it is safe to conclude that he made no preparations at all. In the circumstances, we are of the view that the learned judge's assumption that the respondent would in all probability have passed the examinations cannot be sustained. The evidence completely negates such probability.

The loss of future earnings assessed by the learned judge is the difference between the respondent's present salary and what he would get as a Superscale *G* officer, and this assessment began from the date of the accident as if he was already in Superscale *G*. In our view such assessment is untenable as it is contrary to evidence and common experience. It is a well-known fact that the passing of the prescribed Bahasa Malaysia examinations only entitles an officer to confirmation in the service. It does not however automatically promote him to Superscale *G*. Promotion to this scale depends upon vacancies. Thus a confirmed officer has to wait for at least eight to ten years for a vacancy to occur before he can be expected to act in Superscale *G*. In the present case the respondent was not even confirmed, much less promoted to Superscale *G* which is as remote as it is purely speculative. The correct view should be that as he suffers no diminution in salary, but continues to be paid his accident salary he loses nothing, although he is now no longer the headmaster. We therefore hold that the learned judge's award of $112,722.80 calculated at the rate of $1,000 per month for 13 years as loss of future earnings from the date of the accident to date of retirement cannot be sustained.

The second subheading for loss of future earnings is the sum of $60,908 awarded for loss of earning after retirement. This figure represents the estimated income which he would otherwise enjoy from a post retirement occupation and the estimated reduced pension which he would suffer for losing the chance of promotion to Superscale *G*. The combined estimated loss of these two constituent elements is at $1,000 per month for six years. The total loss therefore is arrived at the sum awarded. We do not know how much of this amount of $1,000 is attributable to loss of pension and what is the method of calculating it. In our view since promotion to Superscale *G* was not even a possibility at the time of the accident, there can never be a loss or reduction of pension factor entitling him to higher pension. Loss of pension factor and reduction of pension should not at all be taken into consideration. We however agree that employment after retirement from the public service at the age of 55 is a common occurrence which should be taken into consideration. If not injured the respondent being a teacher would likely give a least private tuition to some needy pupils. The income from such occupation may be fixed to be at $600 per month and taking into consideration various contingencies, such as illness and lack of interest in taking up post-retirement job we think it is fair that we should fix 5 years of purchase. This will bring a sum of $31,172.23.

As for the award of $10,000 for loss of gratuity factor, the assessment is also based on promotion to Superscale *G*. For similar reason stated above we quash this part of the award.

We however allow the amount of special damage of $500 for travelling expenses to hospital.

In conclusion, our award is as follows: —

(a) For pain suffering and loss of amenities -	$ 70,000.00
(b) Loss of future earnings - - - -	$ 31,172.23
(c) Travelling expenses to hospital - - -	$ 500.00
Total:	$101,672.23

Interest at 6% per annum is charged on (a) from the date of the issue of the writ, and interest at 4% on (b) and (c) from the date of the judgment.

The appeal is therefore allowed with costs.

Appeal allowed.

Solicitors: *Shearn Delamore & Co.; Khoo & Sidhu.*